Supreme Court, U.S.
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No. 94-22

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

Diane Washington,

Petitioner

v.

United States of America,

Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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I.

REPLY TO STATEMENT

The district court did not rule Petitioner was precluded from litigating her claim because of a district court in an earlier case had ruled that the Feres doctrine barred her claim. Judge Thompson entered an order dismissing the first complaint filed by Petitioner without prejudice. No judgment was entered. Petitioner revised and refiled her complaint in response to the criticisms made by Judge Thompson. The revised complaint was assigned to Judge Gilliam who accepted jurisdiction.

Petitioner's revised complaint added allegations claiming her injuries were not service connected and that she and the Navy had

agreed that her injuries were not service connected. The revised complaint was challenged by the government on the ground that it was barred by the *Feres* doctrine, and on other grounds, and was held to be sufficient. Pet. App. A-44.

In the hearing related to the government's second motion to dismiss the revised complaint Judge Gilliam made a comment concerning the law of the case which the government now seizes on. This unexplained comment by Judge Gilliam was made after he had stated the apparent reason for his ruling, namely that the government now claimed its policy was not in effect until after Petitioner was injured (Pet. App. A-37). This contention has been withdrawn by the

government in light of the evidence.

Until the ruling on the second motion to dismiss, Petitioner had no reason to believe the revised complaint on file was insufficient, since Judge Gilliam had already denied a motion to dismiss based on the same grounds raised in the second motion. District court judges have the power to change their mind at any time until judgment is entered. Judgment was not entered in this case until October 28, 1992. Petitioner timely appealed from this final judgment.

The court of appeals did not rest its decision on the alleged claim that the matter had already been

decided. Pet.App. A-17, A-18. As the government concedes in its opposition, "the court of appeals declined to address these issues." (Brief in Opp., p.4). All the government's arguments about what might happen when the decision is reversed are pure speculation.

As will be discussed, the procedural issues Respondent raises raises have no merit and have no effect on the Petition. This matter is properly before this Court. If the decision of the court of appeals on the *Feres* doctrine issue is reversed, the outcome will be different.

II.

REPLY TO ARGUMENT

A. Collateral estoppel, issue preclusion, and the law of the case doctrine do not bar the litigation the Feres doctrine issue in this case.

Judge Thompson's order dismissing the first complaint was made specifically without prejudice. Brief in Opp.App. p.3a. What this meant procedurally was that Judge Thompson's order was not a final judgment from which Petitioner had to appeal and was not res judicata. Costello v. United States, 365 U.S. 265, 286 (1961).

Judge Thompson's order also did not collaterally estop Petitioner from raising the *Feres* doctrine issue before the court of appeals when she

appealed the judgment dismissing the case. Prejudgment orders remain interlocutory and can be reconsidered at any time. Peterson v. Lindner, 765 F.2d 698, 704 (7th Cir. 1985). In this case Judge Gilliam had before him the revised complaint and had the power reconsider Judge Thompson's earlier ruling in light of it, which he did twice.

In Deutsch v. Flannery, 823 F.2d 1361, 1364-1365 (9th Cir. 1987) the court found that certain revisions made to a complaint after a motion to dismiss was granted without prejudice were sufficient to cure the defects. The Deutsch court did not estop the Plaintiff from making those changes.

Respondent must establish four elements for collateral estoppel to apply: that the issue sought to be

precluded is the same as that in the earlier action; that the issue was fully litigated; that the issue was determined by a final judgment; and that the issue was essential to the determination. Farmland Industries, Inc. v. Morrison-Quirk Grain Corporation, 987 F.2d 1335, 1339 (8th Cir. 1993). Respondent can not establish any of these elements and certainly not all four of them. Respondent also can not show any real prejudice.

Where an order like Judge Thompson's relies on alternative grounds and is made without prejudice, a party does not have to try to appeal it immediately if the party agrees with one ground and acts accordingly. It is unfair to apply collateral estoppel in

such situations. See, e.g., Deweese v. Town of Palm Beach, 688 F.2d 731, 733-744 (11th Cir. 1982).

Similarly, the law of the case doctrine did not deprive Petitioner of the right to raise the *Feres* doctrine issue in the court of appeals and does not bar her from raising it in this Court. The law of the case doctrine is a rule of practice which does not limit the authority of a higher court. Rent-A-Center, Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 601-602 (9th Cir. 1990). Here, the court of appeal decided the *Feres* issue de novo. All law underlying a judgment (including alleged law of the case) is reviewable on a petition for certiorari. Christianson

v. Colt Industries Operating Corp., 486 U.S. 800, 817-818 (1988).

The procedural cloud Respondent attempts to lose Petitioner in evaporates under the light of analysis. The court of appeals based its decision affirming the dismissal on the *Feres* ground only. If this Court concludes the court of appeals was wrong on the *Feres* issue, Petitioner may proceed. As a civilian she is entitled to recover if she proves her case. Sheridan v. United States, 487 U.S. 392 (1988); See generally Stencel v. Aero Engineering Corp. v. United States, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting) (reasoning that if a military plane crashes into a civilian's house injuring the civilian, "the civilian

would unquestionably have a cause of action under the Tort Claims Act.")

The government itself recently agreed (in a different case) that a civilian who was hurt because of the negligence of the military may recover under the Federal Tort Claims Act even where, unlike here, the injury occurs on military property and involves the use of a military benefit by the injured party. See Elliot v. United States, 13 F.3d 1555, 1557, n.2 (11th Cir. 1994) vacated and reh. en banc granted on other grounds, 26 F.3d 597 (11th Cir. 1994) (where the government paid a judgment awarded in favor of the civilian wife of an army sergeant who was injured at the on-base apartment in which she and her husband lived because of negligent maintenance.)

B. Petitioner is not claiming that she was hurt because of negligent military health services provided to her or her beneficiaries.

In its opposition (Brief in Opp., p. 6) Respondent cites cases where servicemembers or their beneficiaries were barred from making claims based on negligent health care services provided to them by military health care providers in connection with the use of a military benefit by the servicemember. Petitioner makes no such claims. She is in the position of an independent civilian third party who was hurt because the government negligently breached its duty to her. Compare Persons v. United States, 925 F.2d 292, 297-299 (9th Cir. 1991) (where

the court allowed the claims of the serviceperson's family members related to a failure to provide counseling to them to go forward despite the *Feres* doctrine.) The comments made by the court in the Persons case are illustrative of the gut wrenching agony courts go through when the *Feres* doctrine as it now stands is raised as a defense to claims by civilians. Persons, supra, at 299.

The military agrees its AIDS prevention duties run to the benefit of the civilian population. U.S. v. Dumford, 28 M.J. 836, 838-839 (A.F.M.C.M.R. 1989); U.S. v. Negron, 28 M.J. 775, 778-779 (A.F.M.C.M.R. 1989) aff'd 29 M.J. 324 (C.M.A. 1989). Where third parties are hurt because of a negligent failure to

provide proper health care, or where reasonable care is not exercised to protect potential victims, those civilians are not barred by the *Feres* doctrine from suing the health care provider under California law. Jablonski v. United States, 712 F.2d 392 (9th Cir. 1983); Tarasoff v. Regents of University of California 17 Cal.3d 425 (1976). Similarly, where the military voluntarily agrees to assume a duty, makes it a mandatory regulation and then negligently fails to perform the duty, an injured civilian may recover. Dogget v. United States, 875 F.2d 684 (9th Cir. 1989).

C. Petitioner was not a "reservist" when she was injured.

The "reservist" cases cited by the Respondent are all readily

distinguishable from the facts of the instant case. Those cases support Petitioner's contention that she should be treated like a civilian.

In Stencel v. Aero Engineering Corp., supra, at 673 this Court focused on the fact that because the injured soldier was on duty at the time of the injury and concluded military discipline might be improperly interfered with if a suit was brought by the soldier. Here, the injured Plaintiff was not on active or inactive duty or training, was not under orders, and was not subject to military discipline at the time she was hurt. She, unlike the injured serviceperson in Stencel, supra, at 673, is not entitled to benefits because her injury was not service connected.

In Stencel, supra, at 669 n. 6, the Court granted certiorari because of the difficulty the lower courts were having in applying the *Feres* doctrine. This difficulty has not diminished since that time as is indicated by the conflicting results reached in the different circuits as outlined in the Petition.

In Anderson v. United States, 724 F.2d 608, 609-610 (8th Cir. 1983), the court of appeals found the *Feres* doctrine applied because the plaintiff was under orders, on duty, and actually AWOL at the time he was hurt. None of that is true of Petitioner.

In United States v. Carroll, 369 F.2d 618, 621 (8th Cir. 1966) the court of appeals listed four factors on which it relied in determining

that the plaintiff suffered injuries incident to service: the plaintiff was travelling by military transportation; the plaintiff was travelling to a military reserve drill; the plaintiff was in uniform; and the plaintiff was subject to military courtesies and discipline. The Carroll court also noted that the plaintiff was being paid as a reservist at the time of the injury. United States v. Carroll, supra, at 620. None of those factors apply in this case.

Finally, in Mattos v. United States, 412 F.2d 793, 794 (9th Cir. 1969) the court of appeals held the parents of a reservist who was killed by a military truck while he was on weekend military reserve duty could not sue the government because of

Feres doctrine. The Mattos court found there was no merit in an alleged distinction between an on duty reservist and a full-time on duty serviceperson. Ibid. The Mattos court reasoned, "As in *Feres* the availability of compensation for injuries incurred in military service renders such intrusion [i.e., into military performance] unnecessary." Ibid. The situation in this case is completely different. The Petitioner was not on reserve duty when she was injured, she was not on a military base, she was not using military equipment or receiving any military benefit, and, she was specifically denied the right to any compensation because her injuries were not

connected to military service.

In Feres v. United States, 340 U.S. 135, 139 (1950) this Court noted that the Federal Tort Claims Act does not prohibit all claims by servicepersons. This law should not be rewritten by judicial decision to bar the claim of an off-duty reservist whose injuries were suffered while she was engaged in a nonmilitary act, was not on military property, and where her injuries were related to her military status only in the sense that all human events depend on what has already transpired. Green v. Hall, 8 F.3d 695, 700 (9th Cir. 1993) cert. den. - U.S. -, 115 S.Ct. 58 (1994). Petitioner's rights are the same as those of any other civilian.

III.

CONCLUSION.

At the time she was injured, Diane Washington was a civilian, a person who was not a member of the military. The *Feres* doctrine does not bar claims by persons who are not members of the military. Brief in Opp. p. 6, citing U.S. v. Brown, 348 U.S. 110 (1954). Therefore, Petitioner's claims are not barred by the *Feres* doctrine and the decision of the court of appeals is incorrect.

The petition should be granted because the scope of the *Feres* doctrine must be clear or it will continue to trouble the lower courts.

Respectfully submitted,

Dated: 11/7/14

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Counsel of Petitioner